V I R G I N I A:

IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA	)	**CASE NOS. CR03-3089, CR03-3090, CR03-3091**
VERSUS	)	
LEE BOYD MALVO a/k/a John Lee Malvo	)	**INDICTMENT - CAPITAL MURDER (2 Counts) and USING A FIREARM IN THE COMMISSION OF A FELONY**

On July 24, 2003, Robert F. Horan, Jr., the Commonwealth's Attorney, Raymond Morrogh, Deputy Commonwealth's Attorney, LEE BOYD MALVO a/k/a John Lee Malvo, the Defendant, Michael S. Arif, Craig S. Cooley, Mark Petrovich and Thomas Walsh, Counsel for the Defendant, appeared before this Court. The Defendant is indicted for the felonies of CAPITAL MURDER (2 Counts) and USING A FIREARM IN THE COMMISSION OF A FELONY and he appeared while in custody.

A hearing was held on the Defendant's Motion to Suppress. At the conclusion of the hearing, the Court took the motion under advisement.

For the reasons stated in the Court's opinion letter of this date, a copy of which is attached hereto and incorporated herein, the Motion to Suppress is **GRANTED** in part and **DENIED** in part.

Entered on September 2, 2003.

/s/

JANE MARUM ROUSH
JUDGE DESIGNATE

JMR/dmr

FIRST JUDICIAL CIRCUIT
OF VIRGINIA

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September 2, 2003

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In re: *Commonwealth v. Lee Boyd Malvo*
Nos. CR 03-3089, CR 03-3090, and CR 03-3091
(Circuit Court of the City of Chesapeake)

Dear Counsel:

This matter came on for a hearing on July 24, 2003 on the defendant's motion to suppress and the Commonwealth's opposition to that motion. At the conclusion of the hearing, I took the motion under advisement. I have now fully reviewed the briefs, the exhibits and my notes of the testimony. In addition, I have fully considered the arguments of counsel and the authorities cited. For the reasons stated below, the motion

to suppress will be granted in part and denied in part. The motion to suppress will be granted as to any communications of the defendant to Detective Ryan of the Montgomery County (Maryland) police on October 24, 2002. The motion to suppress will be denied as to statements that the defendant made to prison guards at the Maryland Correctional Adjustment Center.

Facts

The defendant, Lee Boyd Malvo, is charged with two counts of capital murder and one count of using a firearm in the commission of a felony. The charges arise from the shooting death of Linda Franklin in Fairfax County on October 14, 2002.

Malvo was arrested in Maryland on October 24, 2002 on a federal material witness warrant that had been issued the previous day. At the time of his arrest, Malvo was 17 years old.[1] Malvo and his co-defendant John Allen Muhammad were suspects in a series of shootings in Maryland, the District of Columbia, and Virginia that left several people dead, including Linda Franklin.

Upon his arrest, Malvo initially was taken to the Family Services Division of the Montgomery County (Maryland) Police Department, where Detective T. Ryan interrogated him. Ryan's notes of the interrogation (Motion to Suppress, Ex. #2) state that Malvo did not speak in response to any of Ryan's questions, but did respond through various forms of non-verbal communication, such as shaking or nodding his head or hand gestures. Ryan read Malvo his *Miranda* rights, after which Malvo indicated that he did not want to speak to Ryan. Motion to Suppress, Ex. #3. Although Malvo invoked his right to remain silent, Ryan questioned Malvo further. Malvo continued to respond to Ryan's questions through only non-verbal communication.

Later on October 24, 2002, Malvo was released to federal authorities in Maryland. He appeared before Magistrate Judge James K. Bredar in the United States District Court for the District of Maryland in Baltimore. Malvo was advised of his *Miranda* rights and was appointed counsel and two guardians *ad litem*. Malvo did not speak at his initial appearance.

Sometime after 5:00 p.m. on October 24, 2002, Malvo arrived at the Maryland Correctional Adjustment Center ("MCAC"), known as the "Supermax" prison, in downtown Baltimore. He remained incarcerated in the MCAC until the federal charges against him were dropped on November 7, 2002 and he was released to the custody of the Fairfax County police.

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[1] Malvo turned 18 years old on February 18, 2003.

While at the MCAC, Malvo engaged in several conversations with the guards assigned to his unit. During these conversations, Malvo made incriminating statements that are the subject of the motion to suppress.

At the hearing on the motion to suppress, Captain Joseph Stracke and Corporal Wayne Davis of the Maryland Department of Corrections testified. Malvo did not testify.

Stracke was called as a witness for the Commonwealth. Stracke testified that he saw Malvo in the prison every day for seven days, during which period he checked on Malvo several times a day. Stracke testified that Malvo did not speak for the first two days. Malvo would respond with a "thumbs up" when Stracke asked him how he was.

Stracke testified that he heard Malvo speak for the first time on Saturday, October 26. Stracke was making his rounds when Malvo banged on the window of his cell and pointed to Corporal Davis's meal, indicating that he wanted some of it. Stracke told Malvo that if he wanted something, he would have to ask for it. Malvo stated that he wanted some fish. Davis gave Malvo some of his fish. Malvo thanked him, and stated that he had a limited diet and sometimes would not eat for days before he went on one of his "missions." Stracke asked Malvo what he meant by "missions." Malvo responded: "Before we go out and kill people." According to Stracke, Malvo proceeded to talk at some length about the shootings with which he is charged. Stracke said the he did not ask Malvo any questions except one. After Malvo was talking for about thirty minutes, Stracke asked him: "Why did you shoot the little boy?" Malvo explained his reasons for shooting the little boy.

Stracke testified that he talked to Malvo every day for the remainder of the time that Malvo was in the MCAC and Stracke was on duty. (Stracke testified he was on duty from "Wednesday to Wednesday," presumably October 23 to October 30.) Stracke testified that he never initiated any discussions with Malvo other than to ask him "How are you doing today?" Although his conversations with Malvo blended together in his memory, Stracke testified that Malvo talked about the shootings frequently while at the MCAC. They also talked about a variety of topics such as sports and Jamaica.

Stracke testified that he did not use any interrogation techniques on Malvo or any intimidating behavior to get Malvo to talk. Stracke said that he has received no training in interrogation techniques. He stated that he did nothing to keep the conversation with Malvo going. He was never armed when he talked to Malvo. Stracke testified that he knew nothing of the interrogation of Malvo by Detective Ryan of the Montgomery County Police or of Malvo's appearance in federal court on October 24.

Stracke testified that he did not take notes of his conversations with Malvo or report on the conversations to police or prosecutors. On Sunday, October 25, a supervisor called Stracke and asked how Malvo was doing. Stracke responded that Malvo was talking. The supervisor asked what Malvo was talking about. Stracke

responded the Malvo was "talking about his crimes." About seven days after Malvo left the prison, the FBI briefly interviewed Stracke about his conversations with Malvo. Stracke surmised that his supervisor must have told the FBI of Stracke's comment that Malvo was "talking about his crimes."[2]

Corporal Davis was called as a witness by the defense. He testified that he guarded Malvo for three days, October 25 through October 27, 2002. Davis said that Malvo did not say anything the first day. He testified that on Saturday, October 26th, Malvo initiated a conversation with him. He noticed the Malvo was examining the ceiling of his cell. Davis, who knew from news reports that Malvo had attempted to escape through the ceiling while in federal custody, said to Malvo: "Whatever you're thinking isn't going to happen." Malvo responded: "You watch too much T.V." Davis retorted: "You should watch T.V." Malvo asked "What is going on on the news?" Davis told him: "They've got you on for a whole lot of shooting." Davis testified that Malvo then proceeded to make incriminating statements about various shootings, including the shooting of Linda Franklin at the Home Depot in Fairfax County.

According to Davis, in all of his conversations with Malvo, "He talked and I listened." As with Stracke, Davis's conversations with Malvo blended together in his memory. Davis recalled asking Malvo some questions, but he could not recall many of the specific questions he asked. Davis said he was curious. Davis did recall asking Malvo whether he and co-defendant John Muhammad had a homosexual relationship and if he was "brainwashed." When Malvo told Davis that part of his motivation for the shootings was racial animosity, Davis asked Malvo "Why didn't you shoot only white people?" Malvo told Davis of his reasons shooting non-white people.

Davis, who like Malvo is from Jamaica, testified that he talked to Malvo on both October 26 and October 27. Their conversations were friendly and touched on a variety of topics, including Jamaica, soccer, music, and politics. Malvo made many incriminating statements detailing his involvement in the shootings. In many instances, Davis thought Malvo was exaggerating or bragging about his role in the shootings.

Davis testified that he was not armed when he spoke to Malvo. He has no training in interrogation techniques. He was not asked by anyone to get Malvo to talk. Davis said that he was not trying to extract information from Malvo about his crimes. Davis did not record or take notes on their conversations. He did not report to police or prosecutors that Malvo was discussing the shootings with him. At one point, Davis told

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[2] The Deputy Commonwealth's Attorney proffered that he came across the FBI's memorandum of its interview of Stracke in the course of reviewing discovery materials in this case. He then went to Baltimore and interviewed Stracke and Davis at greater length. Because these interviews occurred a considerable time after the events, the guards' recollections of the specific dates and times of the discussions with Malvo are imprecise.

Malvo that he did not want to talk to him anymore because Malvo read more than he did and Malvo was making him "feel stupid."

The Motion to Suppress

The defendant has moved to suppress his communications with Ryan in Montgomery County on October 24, and his statements to Stracke and Davis while at the MCAC beginning on October 26 and continuing over the next several days.

I. The Montgomery County Interrogation

The Commonwealth has stipulated that it will not seek to introduce into evidence at trial any of Malvo's communications with Detective Ryan in Montgomery County because of their ambiguity. The defendant asks that Malvo's responses to Ryan be suppressed because they were elicited in violation of his right to remain silent.

The Court will grant to motion to suppress as it relates to any communications Malvo made to Detective Ryan.

The "Advice of Rights Form" that Detective Ryan went over with Malvo clearly indicates that Malvo exercised his right to remain silent. In response to the question "Do you want to talk to us?" Malvo nodded his head from "side to side, [indicating] no." See Motion to Suppress, Ex. #3. Ryan completed discussing the form with Malvo by 11:30 a.m. Nevertheless, Ryan continued questioning Malvo for an extended period. Ryan's notes (Motion to Suppress, Ex. #2) indicate that '[t]he interview resumed at approximately 13:13 hours and was video taped."

In *Miranda v. Arizona*, the United States Supreme Court held:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise

Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

I agree with the defendant that Detective Ryan's interrogation of Malvo violated his right to remain silent.[3] Therefore the motion to suppress is granted as to any information Malvo may have communicated to Ryan.

II. Malvo's Statements at the MCAC

The defendant moves to suppress his statements to the guards at the MCAC. He contends that the statements were taken in violation of his right to be free from compulsory self-incrimination guaranteed by the Fifth Amendment and his right to counsel guaranteed by the Sixth Amendment. In addition, the defendant asserts that his statements were not voluntary and thus their admission in evidence would violate his right to Due Process as guaranteed by the Fifth and Fourteenth Amendments. I will consider each of these arguments in order.

1. Fifth Amendment

The defendant contends that, having invoked his right to remain silent while in custody in Montgomery County, the prison guards at the MCAC could not thereafter interrogate him without readvising him of his constitutional rights.

The defendant relies upon *Michigan v. Mosely*, 423 U.S. 96 (1975). In that case, the United States Supreme Court delineated the circumstances under which the police may re-question a suspect held in custody who has invoked his right to remain silent. The police may question a suspect who has invoked his right to remain silent if the police immediately cease questioning, resume questioning only after the passage of a significant period of time, and provide the suspect with a fresh set of warnings. Id. at 106. The defendant argues that his statements to the guards at the MCAC are not admissible under *Michigan v. Mosely* because Detective Ryan did not scrupulously honor his invocation of his right to remain silent and Stracke and Davis did not provide him with a fresh set of *Miranda* warnings.

The Commonwealth responds that *Michigan v. Mosely* does not apply to the facts of this case. According to the Commonwealth, no fresh set of *Miranda* warnings was required. The Commonwealth argues that, for the purposes of *Miranda*, Malvo was not "in custody," Stracke and Davis were not "law enforcement" officers, and the guards did not initiate an "interrogation" of Malvo.

The Commonwealth first argues the Malvo was not in custody for the purposes of *Miranda* while he was incarcerated in the MCAC. In support of that argument, the Commonwealth cites a number of cases where incarcerated suspects were not deemed in custody for the purposes of *Miranda*. In each of the cases cited by the Commonwealth, however, the suspect was questioned about new crimes that occurred in prison, not the

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[3] Malvo did not invoke his right to counsel during the interrogation by Detective Ryan.

crimes that caused him to be in prison in the first place. The reasoning of these cases is that, when interrogated, the suspect, although incarcerated, was not subject to any greater imposition on his freedom of movement than he otherwise would have been. See, e.g., *Beamon v. Commonwealth*, 222 Va. 707 (1981) (defendant questioned about suspicious activity in prison); *Blain v. Commonwealth*, 7 Va. App. 10 (1988) (defendant questioned about a prison murder); *United States v. Cooper*, 800 F.2d 412 (4th Cir. 1986) (assault on an inmate); *United States v. Conley*, 779 F.2d 970 (4th Cir. 1985) (prison murder); *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978) (drug possession in prison). No case relied upon by the Commonwealth, however, involves facts similar to this case, where the suspect makes statements to prison guards about the activities that led to his incarceration. I conclude, therefore, the Malvo was in custody when he made his statements to Stracke and Davis at the "Supermax" prison.

Second, the Commonwealth maintains that the prison guards were not law enforcement officers for the purposes of *Miranda*. Again, the Commonwealth finds little support in the case law for this position. The case of *Mier v. Commonwealth*, 12 Va. App. 827 (1991), for example, that the Commonwealth relies upon, involved a privately employed store security guard. The Commonwealth cites no case in which a prison guard who is a government employee is not considered to be a law enforcement officer for the purposes of *Miranda*. I conclude, therefore, that Stracke and Davis were law enforcement officers.

The Commonwealth's next argument is that guards did not initiate an "interrogation" of Malvo. According to the Commonwealth, Malvo initiated the discussions of the shootings without any interrogation by the guards.

Miranda v. Arizona defined "custodial interrogation" as "questioning *initiated by law enforcement officers* after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444 (emphasis added). The Supreme Court noted that:

> Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences, is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . .. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 478.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Supreme Court further refined the definition of custodial interrogation. The Court noted that "the special procedural

safeguards outlined in *Miranda* are required not where a suspect in taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." Id. at 300.

The Court in *Rhode Island v. Innis* held that interrogation means not only "express questioning" but also its "functional equivalent." The functional equivalent of express questioning includes "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." Id. at 301. The *Innis* Court explained:

> *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to an interrogation. But since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 301-302 (internal footnotes omitted, emphasis in original).

In *Arizona v. Mauro*, 481 U.S. 520 (1987), the United States Supreme Court held that there was no interrogation where the defendant made incriminating statements to his wife in the presence of prison guards when the guards used no psychological ploys, compelling influences or direct questioning to get the defendant to incriminate himself.

Having considered the testimony of the guards, and the applicable case law, I agree with the Commonwealth that Malvo's conversations with Stracke and Davis at the MCAC did not amount to a "custodial interrogation."

First, the overwhelming evidence at the hearing on the Motion to Suppress was that Malvo initiated his incriminating discussions with the prison guards. The defense argues that Stracke first forced Malvo to speak by telling him that "If you want something, you'll have to ask for it." I do not find that Stracke's statement that Malvo would have to ask for anything that he wanted amounts to initiating an interrogation. Instead, I find that Stracke's comment was a routine question about the incidents of the custodial relationship as noted in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983). In that case, the United States Supreme Court observed:

> There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of any accused to open up a more

> generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, *by either an accused or a police officer*, relating to the routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

Id. at 1045 (emphasis added). See also *Potts v. Commonwealth*, 35 Va. App. 485, 546 S.E.2d 229 (2001).

When Malvo made the statement that he had a very limited diet and would not eat for days before he went on one of his missions, he initiated a more generalized discussion relating directly or indirectly to the investigation of the shootings. That statement was not made in response to any question by Stracke or Davis. Similarly, it was Malvo who initiated the discussions of the shootings with Davis when he asked Davis "What is going on on the news?" Once Malvo began discussing the shootings, he discussed them at some length and in great detail with the guards. His discussions continued with very little prompting by Stracke or Davis, although they did ask some questions if they did not understand what Malvo meant.

The facts of this case are similar to those of *New Jersey v. Bey*, 258 N.J. Super. 451, 610 A. 2d 403, *certif. denied*, 130 N.J. 19, 611 A.2d 657 (1992). Although *Bey* was decided on the basis of the Sixth Amendment right to counsel[4], its holding is instructive to the issues presented by Malvo's Fifth Amendment challenge to the admissibility of his statements.

Bey was convicted of capital murder and sentenced to death. He was housed on death row in the New Jersey State Prison during the pendency of his appeal. Bey's conviction was reversed and, at the retrial, the prosecution wanted to introduce Bey's statements made to one of his prison guards on death row.

While in prison, Bey talked regularly with Pearson, a prison guard. "They engaged in daily conversations about various subjects. . . . [T]hey spoke about 'everyday life, sports, women, different things.'" Id., 610 A.2d at 408. More than once, Bey and Pearson discussed "why Bey was in custody." Bey made statements that incriminated him in the murder that was the subject of his appeal. Pearson testified that he listened to Bey and did not interrogate him. Pearson did ask questions of Bey "if it was something I didn't understand." Pearson testified "I asked him why would he do that. What kind of mind you was in." Pearson characterized this as a "human question" he asked because he was "curious." Id., 610 A.2d at 410.

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[4] The trial court rejected Bey's Fifth Amendment arguments and Bey did not pursue that issue on appeal.

The New Jersey appellate court affirmed the trial judge's ruling allowing statements to be used at Bey's retrial. The court found that Pearson was a "law enforcement" officer for the purposes of *Miranda*, but that he did not set out to elicit information from Bey in his capacity as a corrections officer. Rather, Bey volunteered the information in conversations that he initiated with Pearson. In upholding the admissibility of the statements, the court reasoned:

> Although Person was certainly a law enforcement officer, he never listened to the statements intending their use as evidence at trial. He was not acting under the direction of the State when he had the discussions with the defendant, except in performing his correction officer's duties . . ..

610 A.2d at 415.

In a federal *habeas* proceeding, the United States Court of Appeals for the Third Circuit agreed that the use of Bey's statements to Pearson at his retrial did not offend the Sixth Amendment. See *Bey v. Morton*, 124 F.3d 524 (3rd Cir. 1997). The federal court reasoned that it was "critical" that "Pearson, while a state actor, was not a state actor deliberately engaged in trying to secure information from the defendant for use in connection with the prosecution." No question asked by Pearson was "deliberately designed to elicit incriminating remarks." 124 F.3d at 531. See also *Ohio v. Tucker*, 81 Ohio St. 3d 431, 692 N.E.2d 171 (1998) (casual conversation with prison guards not an interrogation for *Miranda* purposes); *Battenfield v. Oklahoma,* 816 P.2d 555 (Okla. Crim. App. 1991) (voluntary conversations with deputy during trial recesses not interrogation for *Miranda* purposes).

In sum, I conclude that Malvo's conversations with Stracke and Davis at the MCAC in October 2002 were neither a custodial interrogation nor the functional equivalent of interrogation. Although Malvo was in custody, and the prison guards were law enforcement officers, Malvo initiated the conversations, and the guards did nothing deliberately to elicit any incriminating statements. Completely absent is any suggestion that Malvo's statements were in any way coerced. The evidence is quite to the contrary. Malvo's statements about the shootings were completely voluntary.

Miranda does not bar the use at trial of "[v]olunteered statements of any kind." 384 U.S. at 478. In *Michigan v. Mosely*, the United States Supreme Court observed that *Miranda* does not require "absurd and unintended results" such as exclusion of a statement "volunteered by the person in custody without any further interrogation whatever." 423 U.S. at 102.

2. Sixth Amendment

During the time of Malvo's conversations with Stracke and Davis, he was the subject of either the material witness warrant or the criminal information and he was represented by counsel. In that Malvo had counsel at the time of his conversations with Stracke and Davis, he argues that the prison guards could not question him without the presence of his attorneys.

Once the Sixth Amendment right to counsel has attached, the government may not use at trial incriminating statements "deliberately elicited" from the accused by law enforcement officers without the presence of defense counsel or a waiver of the right to counsel. *Massiah v. United States*, 377 U.S. 201 (1964); *Brewer v. Williams*, 430 U.S. 387 (1977); *Maine v. Moulton*, 474 U.S. 159 (1985).

The case of *Bey v. Morton*, 124 F.3d 524 (3rd Cir. 1997), discussed above, analyzed a defendant's Sixth Amendment challenge to the admissibility of his conversations with a prison guard at a time when he had appellate counsel. In that case, the court found no Sixth Amendment violation. "We hold that there was no violation of Bey's Sixth Amendment right to counsel because there was no deliberate elicitation of incriminating information for use in connection with his prosecution." 124 F.3d at 525. The court reasoned:

> The critical distinction between this case and the Massiah [line of cases] is the Pearson [the prison guard], while a state actor, was not a state actor deliberately engaged in trying to secure information from the defendant for use in connection with the prosecution that was the subject matter of counsel's representation. While it may be debatable whether any of the information used at trial was given by Bey in response to a question from Pearson, the state court found, based on undisputed facts, that no question asked by Pearson was part of an effort "deliberately designed to elicit incriminating remarks" for use against Bey. While it thus may not be clear whether there was an "elicitation" by Pearson, there certainly was no "deliberate elicitation" within the teachings of the cases Bey relies upon.

Id. at 531. The court found that the prison guard was in no way trying to elicit incriminating information from Bey for use in Bey's trial:

> First, Pearson had no responsibility for eliciting or reporting information for use in the prosecution of Bey's case and was not working with anyone who had such responsibility. Second, and most importantly, Pearson did not behave like someone who intended to secure incriminating statements from Bey. . . . Pearson did not take any notes or compile any reports of his conversations with Bey.

Id.

I conclude the use at trial of Malvo's statements to his prison guards will not offend his right to counsel as guaranteed by the Sixth Amendment. The statements were completely voluntary on Malvo's part, and, although the guards at times asked him questions, there is no evidence whatsoever that the guards were deliberately eliciting incriminating information from Malvo for use at his trial. Just as with the guard in *Bey v. Morton*, neither Stracke nor Davis was reporting to anyone or anticipating that he would be called upon to recount the substance of his conversations with Malvo at trial. Of note is Davis's testimony that at one point he told Malvo that he did not want to talk to Malvo any more. Such a comment would be unthinkable from a law enforcement officer who is trying deliberately to elicit incriminating information from a suspect for use at trial.

The United States Supreme Court has explained that the *Massiah* line of cases is concerned with "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986). The conversations between Malvo and his prison guards were in no way a "secret interrogation by investigatory techniques." ""[T]he Sixth Amendment is not violated whenever – by luck or happenstance – the State obtains incriminating statements from the accused after the right to counsel has attached." *United States v. Henry*, 474 U.S. 264, 276 (1980) (Powell, concurring); *Maine v. Moulton*, 474 U.S. 159, 176 (1985), *Kuhlman v. Wilson*, 477 U.S. 436, 459 (1986).

3. Due Process

Malvo argues that his statements made to Stracke and Davis during his incarceration at the MCAC should be suppressed because they were not voluntary and as such their use at trial would violate his Due Process rights.

The test of voluntariness is whether the accused's statement is the product of an essentially free and unconstrained choice by its maker or whether the maker's will has been overborne and his capacity for self determination critically impaired. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973); *Midkiff v. Commonwealth*, 250 Va. 262, 462 S.E.2d 112 (1995).

I have considered the totality of the circumstances in determining whether Malvo's statements to the prison guards at the MCAC were voluntary. I have considered all of the testimony adduced at the July 24, 2003 hearing on the motion to suppress, together with the previous evidence I have heard regarding Malvo's age, education, life experiences and prior experience with the criminal justice system. I conclude that the Commonwealth had met its burden to show that Malvo's statements were entirely voluntary. Accordingly, the admission of the statements in evidence in Malvo's trial will not violate his Due Process rights.

Conclusion

For the foregoing reasons, I have today entered the enclosed order granting in part and denying in part the defendant's motion to suppress.

Sincerely,

/s/

Jane Marum Roush
Judge Designate